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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
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RE: AR 651—PacifiCorp's Comments on Staff's AR 651 Division 38 Direct Access Regulation Straw Proposal.

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) submits these comments in response to Staff's Division 38 Direct Access Straw Proposal. In light of the significant new policy proposals included in the straw proposal, PacifiCorp recommends that Staff schedule additional workshops during the informal phase of this proceeding to provide additional opportunity for discussion and written comment prior to bringing new draft rules to a public meeting.

While PacifiCorp understands the desire to move the docket forward, Staff's straw proposal attempts to address some of the most complex and challenging issues associated with direct access. While the straw proposal provides some concrete language that is very useful for spurring meaningful discussion, PacifiCorp believes the best use of the straw proposal is, in fact, to serve as a springboard for those meaningful discussions. Because the straw proposal was drafted without meaningful input from stakeholders, however, many of the provisions are incomplete and ambiguous, while others appear flawed for other reasons. Consequently, PacifiCorp believes the best course of action is for Staff to modify its proposed schedule in this proceeding to allow for further discussion and development of draft rules.

A. Default Supply, Provider of Last Resort (POLR) Risk

In 2001, the Oregon Legislature pulled back sharply from its initial efforts to deregulate the retail electricity sector it had begun in 1999,[1] expressing profound uncertainty about the impacts of deregulation, including "*considerable uncertainty about the extent to which electric companies will be called upon to supply electricity to Oregon consumers at cost-based rates*."[2]

From the outset of this proceeding, PacifiCorp has noted that POLR risk is one of the primary challenges associated with maintaining a bifurcated electric system. The issue should be taken seriously, particularly in a time of anticipated regional supply shortfall and rapid utility transition under House Bill (HB) 2021. POLR issues are important and complex and merit meaningful

[1] SB 1149, 70th Or. Leg. Assemb., Reg. Sess. (1999) (preamble).
[2] HB 3696, 71st Or. Leg. Assemb., Reg. Sess. (2001) (preamble).

discussion. While PacifiCorp appreciates Staff's efforts to develop solutions to the issue in its straw proposal, there should be room for a broader discussion of POLR concerns and to work through ambiguities and necessary revisions to Staff's straw proposal.

1. POLR issues are critically important.

A POLR is the utility or other entity that has the obligation to serve all customers, including returning direct access customers. Staff's straw proposal assumes that the utility will serve as POLR, a conclusion PacifiCorp believes is a reasonable and practical one. Staff may be assuming that resource adequacy requirements, combined with preferential curtailment, will provide meaningful tools to address reliability issues associated with rapid customer return. But these tools are not an adequate substitute for caps, and concerns about POLR risks are not merely short-term reliability concerns.

- The Western Power Crisis led to rolling blackouts in California, but blackouts were not a significant concern in Oregon. This does not mean that Oregon was left unscathed. The legacy of the crisis in Oregon was the permanent destruction of meaningful segments of Oregon's economy and tens of billions of dollars in additional customer costs across the West.[3]

- The 2021 ice storms in Texas led to blackouts, hundreds of deaths, and an emergency session at the Texas Public Utility Commission to address concerns about "mass transition of retail electric customers to providers of last resort."[4] But once the immediate reliability concerns from that storm had abated, the financial legacy was an estimated $80-$130 billion dollars in losses to the State of Texas as a result of "power loss, physical infrastructure damage and forgone economic opportunities" created by the need to scramble for power when there was none.[5]

When there is not enough power to go around, the resulting costs are not necessarily minor and short term. They can be devastating and long-term.

2. Staff's preferential curtailment proposal is ambiguous and requires further discussion and development.

At the outset, PacifiCorp would reassert the position it has taken through this docket that preferential curtailment should not be a primary tool for mitigating against POLR risks. Caps are a critical tool for protecting customers against both the known risks of customer defection and the unknown risks associated with market volatility and new Commission direct access policies.[6]

[3] The Western Power Crisis may seem like ancient history, but litigation and financial impacts remain 20 years later. FERC Docket No. EL00-95 was opened in the summer of 2000 and remains a live docket today.
[4] PUB. UTIL. COMM'N OF TEX., OPEN MEETING AGENDA FRIDAY, FEBRUARY 19, 2021 (2021), https://www.puc.texas.gov/agency/om/021921emergencyopenmeeting.pdf.
[5] Ariana Garcia, *Winter Storm Uri cost Texas between $80 and $130 billion, report shows*, HOUS. CHRON. (Nov. 2, 2021), https://www.chron.com/politics/article/Texas-winter-storm-freeze-deaths-financial-cost-16585329.php .
[6] *See In re Portland General Electric Company, Request for a General Rate Revision*, Docket No. UE 335, Order No. 19-128 at 3 (Apr. 11, 2019) ("We routinely use caps and limits to place bounds on potential negative outcomes,

Caps put a known limit on the amount of a utility's departing load, which in turn allows the Commission to assess how direct access policies are working before opening up additional tranches of load to potential defection. PacifiCorp has no objection to a policy that would require the Commission to review caps on a regular basis to determine whether incremental increases are appropriate, but PacifiCorp strongly objects to a Commission policy that would minimize the need for caps, let alone forego them altogether by replacing caps with a policy of preferential curtailment. While Staff's position on the need for caps appears to remain neutral at this point, PacifiCorp—a utility for which more than 50 percent of its retail load could be eligible for direct access—believes this neutrality is misplaced.

Using preferential curtailment as a front-line tool for protecting cost-of-service customers from the risks associated with a utility's POLR obligation represents, in PacifiCorp's view, poor regulatory policy. One of this Commission's primary duties is to ensure the availability of electric service to customers at fair and reasonable rates.[7] While PacifiCorp agrees that it is appropriate for returning direct access customers to endure exposure to market pricing for some period of time as a result of their unplanned return, this policy is strikingly different in kind from a state commission policy that requires no electric service at all.

A review of the characteristics of PacifiCorp's direct access customers adds some context to such a policy. The broad categories of direct access customers in PacifiCorp's service territory include hospitals, education facilities, and housing. Even at this high level of detail, it seems evident that a policy that cuts off electricity for these customers as a first-line policy choice would represent a regulatory failure.

Even if preferential curtailment is used as an additive, rather than primary, tool to protect against POLR risk, Staff's straw proposal needs further discussion and refinement before it can be operational. Because the straw proposal was not vetted in workshops, the implementation details are ambiguous and would benefit from further discussion. A few examples are provided below.

"Excess capacity" should be defined.

As Staff explains, under the straw proposal, preferential curtailment would only be available when energy is not available on the market and when the utility does not have excess generation capacity to serve returning customers.[8] It is unclear from the straw proposal how the utility would make this determination. At a minimum, "excess generation" should be defined.

Generation capacity is held for a number of reasons, including compliance with reliability standards such as contingency reserve requirements and other reliability and planning needs. These reserves can be used only in certain specified conditions, typically emergency situations. Reserves are held for a number of other reasons, as well. PacifiCorp assumes such capacity would not be considered "excess," but the rules should be clear on this point.

The term "excess" should be defined in terms of "in excess of what." Reliability requirements are

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particularly where future system impacts for a course of action are unknown or unknowable. Caps can act as a tool used to balance policy priorities and protect against potential negative impacts.").

[7] ORS 756.040(1).

[8] *Staff's Straw Proposal* at 1 (Sep. 1, 2022).

not the only issue. Recognizing the legal complexities associated with need to obtain or deploy generation for returning customers, California utilities have engaged in discussions about whether POLR rules should provide limited waivers to the state's resource adequacy, renewable portfolio standard (RPS), and integrated resource plan (IRP) requirements for procurements that are necessary to provide service to involuntarily returned customers.[9] While it is unclear whether such waivers could be permitted in Oregon,[10] the discussion exemplifies the need for specificity. While PacifiCorp presumes that generation held for reliability requirements is not "excess," what if the generation is needed to meet resource adequacy or RPS standards or other requirements?

In addition, if a utility has capacity that could be viewed as "excess" to any of its preexisting load service, contractual, or regulatory obligations during times of market scarcity, that capacity could be sold in the market at prevailing high market prices to offset high power costs that would otherwise burden cost-of-service customers. Should this capacity, which would otherwise be deployed for the benefit of existing cost-of-service customers, be considered "excess" capacity? If so, the straw proposal should be modified to ensure the full costs of providing service to returning direct access customers is included, including allowing the utility to provide its own "excess" generation to returning customers at prevailing market prices to ensure remaining customers remain whole, or, where appropriate, including associated capital costs.[11]

"Infeasibility" should be defined, and implementation details included in draft rules.

Under the straw proposal, a utility unable to serve a customer on emergency default service may preferentially curtail the returning customer unless doing so is "infeasible" or "would negatively affect the electric system's reliability." [12]

At a minimum, the term "infeasible" should be defined and implementation details provided. It is unclear from the straw proposal whether the term "infeasible" refers to a direct access customer that should not be curtailed because of the nature of that customer's business (a hospital, an emergency service provider, etc.), because it is physically impossible to preferentially curtail the customer, or because the cost of added facilities needed to preferentially curtail the customer is deemed too high based on some unspecified standard. This definition is important, because the alternative to preferential curtailment appears to be making the customer subject to a utility tariff to cover the costs of planning for that customer's capacity.

It is also unclear when this assessment would be made, what criteria would govern the assessment, what process would be used for this assessment, and, if preferential curtailment is deemed

[9] *See In re Order Instituting Rulemaking to Implement Senate Bill 520 and Address Other Matters Related to Provider of Last Resort*, Cal. Pub. Util. Comm'n, R. 21-03-011, Ruling of the Assigned Commissioner and Assigned ALJ Requesting Comments on Financial Security Requirements and Reentry Fees, and Modifying the Proceeding Schedule at 3 (May 2, 2022) (summarizing topic).
[10] The Western Resource Adequacy Program would establish regional resource adequacy requirements under FERC's purview, and Oregon's RPS standards are largely set by statute, not rule.
[11] At a minimum, the rate contemplated by draft rule 860-038-0290(2)(a) should include a utility's full cost of providing service to a returning customer, including lost opportunity costs for remaining customers responsible for utility's net power costs.
[12] *See proposed* OAR 860-038-290(5). PacifiCorp suggests that the phrase "would negatively affect the electric system's reliability" should be supplemented with "or would require the utility to use resources needed to comply with reliability standards."

"feasible," when and how the departing customers should be required to pay for facilities needed to implement preferential curtailment. It would seem important to discuss these details before draft rules are advanced to the formal rulemaking phase.

Planning for individual departing customers should be better explained.

When preferential curtailment is not implemented, the utility would be required to "plan for and acquire capacity to account for a direct access consumer's potential return to the electric company's service."[13] The implementation details for this tariff should be better defined. It is unclear whether the utility should plan for additional system resources, or to make specific acquisitions to be used for (and allocated to) specific customers. Moreover, the additional details needed to develop and implement such a tariff are likely to be controversial, particularly without additional guidance.

Even if the policy of preferential curtailment is not a first-line policy for mitigation of POLR risk, as PacifiCorp suggests it should not be, the ambiguity in the rule as written suggests that further discussion is important to ensure that the policy is clearly defined and meaningfully operational. The complexity of the proposed preferential curtailment provisions would add a significant administrative burden to utilities, direct access customers, and the Commission even if implemented cleanly and with clear mutual understanding of definitions and implementation details. Without clarity, however, this added burden is likely to be magnified by litigation.

3. <u>POLR issues are complex and warrant more discussion as a general matter</u>.

PacifiCorp does not view preferential curtailment as an appropriate or adequate solution to the POLR issue. Moreover, if multiple electricity service suppliers (ESSs) were to fail or decline to provide service to direct access customers for one reason or another, a safety net based largely on the imposition of resource adequacy (RA) obligations would not necessarily ensure a POLR could reasonably meet system reliability needs or ensure uninterrupted service for returning customers, either.

For example, the State of California has determined that its existing IRP and RA planning requirements do not adequately address customer risk associated with POLR obligations.[14] California is thus investigating POLR requirements to fill the gaps in its current regulatory framework in a rulemaking docket (R. 21-03-011). That rulemaking docket was opened in May 2021 and is looking broadly at potential mechanisms for protecting customers from customer return.[15]

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[13] *Proposed* OAR 860-038-0290 (5)(a).

[14] Direct-access providers in California are already required to comply with the state's resource adequacy requirements, renewable portfolio standards, and integrated resource planning programs. *See, e.g.,* CAL. PUB. UTIL. CODE §§ 380(e), (k); CAL. PUB. UTIL. CODE § 454.52(a). The CPUC divided the rulemaking into two phases: Phase 1 will focus on the issues necessary for a comprehensive framework for the existing POLRs and Phase 2 will develop rules that allow a different entity (e.g., an ESP) to be designated as POLR. The rulemaking is still in Phase 1, and a proposed decision for the Phase 1 rules is not expected until sometime in the first half of next year. When an ESS fails, it also is at high risk of default on contracts for new construction, which could create additional shortfalls and further market instability.

[15] R. 21-03-011, Order Instituting Rulemaking to Implement Senate Bill 520 and Address Other Matters Related to Provider of Last Resort (Mar. 8, 2021).

Staff may believe that California is different because it has community choice aggregation, while Oregon does not, but the issues associated with customer defection remain the same regardless of the mechanism for that defection. More than half of PacifiCorp's load is eligible for direct access under Oregon law. While the Commission has historically addressed POLR concerns through the implementation of caps which have proven to be effective, Staff has not expressed an opinion about whether it believes caps continue to be critical for customer protection. If the Commission does not cap the overall load eligible for direct access, PacifiCorp will face the possibility of significant defection just as California utilities do.

The California rulemaking has provided an effective forum for the discussion of a variety of new additional solutions to address the potential strain on utilities acting as POLR in the event that direct-access customers are suddenly and unexpectedly returned to the utility's service. These proposals include:

- Financial reporting requirements for direct-access providers to ensure that the utility will receive advance notice of an impending failure;[16]
- Increasing direct access providers' financial security requirement—a bond that the providers must maintain to ensure funding to cover the administrative costs and the incremental procurement necessary to return the providers' customers to the utility's service;[17]
- Requiring direct access providers to include in their procurement contracts a provision granting the utilities a "right of first refusal" to allow the utilities to assume those procurement rights to provide service to customers returning from direct access;[18] and
- Redefining the POLR obligation to specifically identify POLR service as a temporary, market-cost service that the utilities provide to the returning customers only for as long as necessary to recover the costs of returning those customers to the utility's service.[19]

While PacifiCorp is not advocating for a two-year proceeding to address POLR issues,[20] the

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[16] R. 21-03-011, Southern California Edison Response on the ALJ's Ruling Directing Further Party Comment, Requesting Party Proposals, and Amending Procedural Schedule at 3-4 (Dec. 17, 2021); R. 21-03-011, Opening Comments of Pacific Gas and Electric at 17 (Dec. 17, 2021); R. 21-03-011, Comments of San Diego Gas & Electric Company In Response to ALJ Ruling at 16-17 (Dec. 17, 2021).

[17] *See, e.g.*, R. 21-03-011, Comments of the Public Advocate's Office on the ALJ's Ruling Directing Further Party Comment, Requesting Party Proposals, and Amending Procedural Schedule at 9 (Dec. 17, 2021); R. 21-03-011, Comments of SDG&E in Response to ALJ Ruling at 19 (July 5, 2022).

[18] R. 21-03-011, ALJ's Ruling Directing Further Party Comment, Requesting Part Proposals, and Amending Procedural Schedule, Attachment 2: Additional Questions Regarding Whether and How to Update Specific POLR Requirement at 3 (Nov. 23, 2021).

[19] R. 21-03-011, ALJ's Ruling Distributing Workshop Agenda and Providing Questions for Additional Post Workshop Comments at 3 (Feb. 24, 2022).

[20] At the outset of the proceedings, the CPUC concluded that the Phase 1 proceedings would take longer than the standard 18-month timeframe, and instead proposed a schedule of 24 months. R. 21-03-011, Assigned Commissioner's Scoping Memo and Ruling at 9 (Sept. 16, 2021). The CPUC has repeatedly modified its expected schedule for this rulemaking docket. R. 21-03-011, Ruling of the Assigned Commissioner and Assigned ALJ Requesting Comments on Financial Security Requirements and Reentry Fees, and Modifying the Proceeding Schedule at 5 (May 2, 2022) ("The schedule for Phase 1 of this proceeding is amended to reflect the request for party comment on the [financial

discussion in California suggests it would be appropriate to allow stakeholders some measure of time to discuss POLR issues though workshops and written comments. In short, PacifiCorp believes that further collaboration among stakeholders to discuss Oregon-specific POLR solutions would be helpful before presenting draft rules to the Commission.

B. Non-bypassable Charges

PacifiCorp largely supports Staff's proposed definition for Non-bypassable Charges but recommends some additional changes. Staff's straw proposal is based on language circulated to the parties by Northwest Intermountain Power Producers Coalition (NIPPC), with some modifications to reflect some changes proposed by Portland General Electric Company (PGE) and PacifiCorp.[21] PacifiCorp appreciates Staff's changes but continues to believe that additional changes are necessary to ensure the rule conforms with the applicable legal standards. These changes are addressed in the attached redline, which aligns with PacifiCorp's and PGE's informal email comments sent on August 25, 2022.

Non-bypassable charges should be linked to the appropriate legal standard: the prohibition on unwarranted cost shifting. The current draft rules include a factor linking non-bypassable charges to the need to ensure fair, just, and reasonable rates. It is critical that retail rates are fair, just, and reasonable, of course, but this is true for any rate. In the context of direct access, however, the point is to protect customers from unwarranted cost shifting caused by customer defection, a more specific standard with more meaning in this context. As PacifiCorp noted in its emailed redline, a rate can be "fair, just and reasonable" even when it contains illegal charges—it is the totality of the rates that matter in the context of that legal standard.[22]

For example, in the litigation resulting from PGE's closure of the Trojan nuclear generating facility, the Oregon courts concluded that the Commission's decision approving rates that included a "return on" the closed Trojan facility was unlawful, because utilities' rates can include only capital investments that are currently used for the provision of utility services.[23] However, on remand, the Commission still assessed the separate question of "whether the error identified by the Court of Appeals renders the rates adopted in UE 88 unjust and unreasonable, and therefore unlawful."[24] As the Commission recognized in that order, a single unlawful charge may not render the entire rate unreasonable, because "ratemaking decisions are not made in isolation and

security requirement] and reentry questions in Section 2 of this ruling, the development of an Energy Division Staff Proposal, and the issuance of a single Commission decision addressing all Phase 1 issues."); R. 21-03-011, Email Ruling Granting Request for an Extension of Time to File Financial Security Requirement and Reentry Fee Comments, and Further Modifying the Phase 1 Schedule at 5 (May 24, 2022).

[21] Staff's original draft rule, included in the Staff Report for July 12, 2022 Public Meeting, was developed after multiple workshops and stakeholder discussion. *See* Staff Report for July 12, 2022 Public Meeting (July 7, 2022). Because so little discussion has occurred regarding the new language, PacifiCorp continues to believe that any straw proposal should use the language Staff proposed after the workshops in this docket, not NIPPC's proposal. However, Staff's straw proposal includes a modified version of the NIPPC proposal, so PacifiCorp will address that version of the draft rule.

[22] *See In re The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement*, Dockets DR 10, UE 88, and UM 989, Order No. 08-487 at 63 (Sept. 30, 2008).

[23] *Citizens' Util. Bd. v. Publ. Utils. Comm'n*, 154 Or App 702, 716 (1998).

[24] *In re The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement*, Dockets DR 10, UE 88, and UM 989, Order No. 08-487 at 64 (Sept. 30, 2008).

individual rate elements are frequently interdependent and mutually supporting."[25] Thus, the Commission's responsibility to ensure fair, just, and reasonable rates does not, standing alone, address whether the rates include any unlawful charges—e.g., unwarranted costs shifted to cost-of-service customers as a result of the utilities' direct-access programs. For that reason, in addition to ensuring that a utility's rates are reasonable, the Commission must separately conclude that the utilities' direct-access programs do not result in such cost-shifting.

PacifiCorp thus proposes removing from proposed OAR 860-038-0170(1)(e) the discussion of "fair, just and reasonable rates" and instead directing the Commission to consider whether it is "fair and appropriate for the charge" to be non-bypassable.

In draft rule OAR 860-038-0170(1)(b), Staff suggests that direct access customers should be required to "contribute *meaningfully*" to any uneconomic costs of implementing public policy goals. This standard does not provide an adequate assessment of non-bypassability, because the term "meaningful" is not defined by any applicable regulation. Moreover, this proposed language does not state the appropriate legal standard for a cost allocation methodology that would protect cost-of-service customers from unwarranted cost shifting. The relevant inquiry is whether ESS customers are paying their fair share of these costs such that there is no unwarranted cost shifting. For this reason, PacifiCorp proposes revising proposed OAR 860-038-0170(1)(b) to specify that uneconomic costs of implementing public policy goals for which ESS customers would otherwise not "contribute their fair share" may be recovered as non-bypassable charges.

C. Confidentiality

The draft confidentiality rules would protect potentially confidential information in ESSs' emissions planning reports. PacifiCorp understands the commercial sensitivity of some of the information that will be contained in these reports, but has expressed some concerns with the proposed language. Staff's proposed tiered approach may be workable, so long as Staff narrowly interprets the scope of these confidentiality requirements and ensures that ESSs and utilities are both held to the proper standard regarding their obligations to reduce emissions.

1. Planning transparency.

In its straw proposal, Staff proposes a tiered system under which only Staff and the Oregon Citizen's Utility Board could review information regarding an analysis of cost-per-megawatt-hour that a customer would be charged for services related to compliance with the emissions planning report.[26] Staff's rules would also not permit utilities to review ESSs' action plans and load forecasts, even after signing a modified protective order.[27] As PacifiCorp noted in its response to similar language proposed by NIPPC,[28] PacifiCorp believes that emissions action plans of ESSs and utilities should be subject to the same level of public scrutiny. The type of load serving entity at issue should be irrelevant to this public policy issue.

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[25] *Id.* at 63.
[26] *Proposed* OAR 860-038-0405(8)(a), (b).
[27] *Proposed* OAR 860-038-0405(8)(c), (d) (allowing only "non-market participants" to review those plans).
[28] *See* Email from Carl Fink to AR 651 Service List, Re: OPUC Docket AR 651 -- Proposed resolution of rule language for ESS Emission Planning Reports (Aug. 1, 2022 at 2:54 p.m.).

2. Auditing of ESS remittances.

PacifiCorp has also noted the difficulty the confidentiality provisions may raise with respect to ESS obligations enforceable by utilities. For example, ESSs are required to remit payment to investor-owned utilities for the ESSs' public purpose charge obligations.[29] It is unclear to PacifiCorp how utilities are meant to verify compliance with this obligation, or others like it, under the current regulatory regime. The provisions in Staff's straw proposal could further preclude the utilities from accessing the information needed to verify that ESS remittances comply with legal requirements. PacifiCorp recommends Staff include a new provision to the rules that requires Staff to audit any such ESS remittances each year.

3. Late ESS compliance deadline.

As PGE has repeatedly noted, Staff's straw proposal continues to postpone ESS compliance with the Emissions Planning Report requirements until 2027.[30] It is not clear how this late date will lead to actions that would allow for continual progress towards HB 2021 emissions targets.[31] Given the regulatory activity and planning activities already underway for utility HB 2021 compliance, it would seem unreasonable for the Commission to wait until 2027 to learn that some ESSs may not be trending toward compliance with 2030 clean energy goals. PacifiCorp continues to support its prior proposal that the initial ESS reporting date be moved to 2024, bringing it in closer alignment with expectations of utilities in UM 2225.[32]

D. Caps

The risk factors identified in Staff's straw proposal are a useful starting point for rules addressing caps, though further discussion and refinement are needed. A critical consideration missing from the draft rules, however, is the generic standard for assessing how these factors will be used in the context of imposing caps.[33] Because an uncapped increase in direct access could potentially shift costs to cost-of-service customers in violation of ORS 757.607(1), the Commission should avoid that risk by capping direct-access load by default and should remove caps incrementally only after determining that they are not necessary.

1. General standard for implementation of caps.

As an initial matter, it is not entirely clear from Staff's proposal whether Staff takes the position that caps are currently warranted.[34] To the extent that Staff's position is that caps are not necessary unless they are proven to be necessary, PacifiCorp strongly disagrees and believes it is critical for the Commission to implement caps to avoid the potential for cost shifting. ORS 757.607(1) states

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[29] *See* OAR 860-038-0480(4) ("The electricity service suppliers will remit monthly the public purpose charges collected from direct service industrial consumers they serve to the electric company in whose service territory the direct service industrial site is located.")
[30] Proposed OAR 860-038-0405(2).
[31] HB 2021 requires investor-owned utilities to file emissions plans concurrent with integrated resource plans (IRPs). Or. Laws 2021, ch. 508, § 4(1) (codified at ORS 469A.415(1)).
[32] *In re Threshold Planning Framework Issues for the First Clean Energy Plans*, Docket No. UM 2225, Order No. 22-206 (June 3, 2022) (requiring PacifiCorp and PGE to file their first Clean Energy Plans with their next IRPs).
[33] Division 38 Direct Access Regulation Straw Proposal at 2 (Sept. 1, 2022).
[34] *Id.* at 1.

that:

> The Public Utility Commission shall ensure that direct access programs offered by electric companies meet the following conditions: (1) The provision of direct access to some retail electricity consumers must not cause the unwarranted shifting of costs to other retail electricity consumers of the electric company.[35]

In other words, if the Commission is uncertain about whether a direct access program will cause unlawful cost shifting, that direct access program may not be adopted. This risk-avoidance approach to direct access is not only consistent with the governing statute, but also with the Commission's New Large Load Direct Access rulemaking, in which the Commission adopted a fixed generation charge that "represent[ed] real costs and risks to the system" even though "costs and risks ha[d] not been quantified[.]"[36] The Commission recognized that the charge could be adjusted "[i]f or when these cost and risks are more comprehensively calculated," but, in the meantime, due to the fact that those risks *could* shift costs to cost-of-service customers, the Commission conservatively adopted a charge that would ensure there would be no *potential* cost-shifting until the risks were accurately calculated.

Similarly, because an uncapped increase in direct access could potentially shift costs to cost-of-service customers in violation of ORS 757.607(1), the Commission should avoid that risk by capping direct-access load and should remove caps only after determining that they are not necessary. As the industry changes, as capacity tightens in the region, and as legislative mandates create new utility obligations, the effectiveness of the Commission's program design may be tested or undermined. To address this risk, the rules should include a presumption that caps are necessary to avoid a sudden unsustainable increase in direct-access load.

Finally, as PacifiCorp has commented throughout this docket, many of the considerations in Staff's straw proposal are not problematic when a limited amount of load defects from the system. However, the larger the amount of load that leaves the system, the more significant potential flaws in the program design will be. California's more developed direct-access system provides an example of the benefits of capping total direct-access load. When California first implemented direct access, customers could purchase electricity directly from electric service providers (ESP). However, in the wake of the 2000-2001 energy crisis, California suspended new enrollment in its direct-access programs.[37] In 2009, California reopened direct access but capped the amount of new nonresidential load eligible for enrollment.[38] The legislature further expanded the cap by 4,000 gigawatts in 2018.[39] This phased-in approach allowed California utilities to ramp up their direct-access programs to new customers while reducing the risk of a large, unanticipated involuntary return of customers in the event of ESP failures.

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[35] ORS 757.607 (emphasis added).
[36] *In re Rulemaking Related to a New Large Load Direct Access Program*, Docket No. AR 614, Order No. 18-341 at 3 (Sept. 14, 2018).
[37] AB 1, 1st Spec. Sess. (Cal. 2001).
[38] SB 695, Reg. Sess. § 2 (Cal. 2009) (codified at *former* PUB. UTIL. CODE § 365.1(b)).
[39] SB 237, Reg. Sess. § 1 (Cal. 2018) (codified at PUB. UTIL. CODE § 365.1(b)). The current statewide direct-access load cap in California is approximately 89,348 gigawatts. *In re Order Instituting Rulemaking to Implement Senate Bill 237 Related to Direct Access*, R. 19-03-009, D. 19-05-043 at 5 (May 30, 2019).

2. <u>Staff's proposed risk factors.</u>

Staff's risk factors for caps provide a useful starting point but warrant further discussion to ensure they reflect the appropriate legal and regulatory standards. Staff's proposed factors and PacifiCorp's initial comments are as follows:

- An increase in direct access load compromises system reliability.
    - The need to maintain reliability is critical, but this factor should be further refined. As noted above, an increase in direct access load should not compromise *actual* reliability, but it should not compromise or risk a utility's ability to meet its planning or reliability requirements, either. An increase in direct access load may not, itself, compromise system reliability at the time a customer departs, but the potential for that departure to compromise a utility's reliability or its ability to meet regulatory reliability requirements in the event of significant customer return is a critical consideration, as well.
- An increase in direct access load shifts an unacceptable amount of cost to cost-of-service customers.
    - The term "unacceptable" should be construed in light of the Commission's obligation under ORS 757.607 to ensure "[t]he provision of direct access to some retail electricity consumers must not cause the unwarranted shifting of costs to other retail electricity consumers of the electric company."[40]
- An increase in direct access load poses undesirable long term financial impacts to cost-of-service customers or the electric system.
    - PacifiCorp agrees this is a relevant factor.
- An increase in direct access load poses other unmitigated risk to cost-of-service customers.
    - PacifiCorp agrees this is a relevant factor, but notes that all risks are not readily measurable and thus the Commission is obligated to protect against unknown risks.

3. <u>Staff's prior positions on caps.</u>

Staff seeks stakeholder comment on its prior positions on caps:[41]

<u>Recalculation of caps each year</u>. Staff proposes that that overall direct access caps will be recalculated each year, or another regular interval, prior to the annual election window to determine availability under the cap to be responsive to the ongoing risks of the program. As PacifiCorp has stated, litigating the issue of ongoing direct access risks on an annual basis would put an undue burden on stakeholders and the Commission. PacifiCorp agrees that direct access caps should be revisited at regular intervals but suggests that a longer interval (such as every three years) would

[40] ORS 757.607.
[41] *Staff's Straw Proposal* at 3.

be more reasonable and efficient.

Petitions to exceed a cap to be examined through a 90-day process. Staff proposes that petitions to exceed a capacity cap should be addressed through a 90-day process akin to the process associated with a utility's voluntary renewable energy tariff. Neither the draft rules nor prior Staff comments explain how this model would be appropriate for addressing the specific risks associated with customer defection. Without more detail, PacifiCorp is unclear about how this model could appropriate apply in the context of direct access; moreover, given the risks at issue, it would appear unlikely that the issues to be resolved in a petition to exceed a cap could be appropriately developed and addressed in most instances within 90 days. Ninety days may be workable if the examination is intended to be perfunctory, but a perfunctory examination would be inadequate to ensure the Commission is meeting its obligations to remaining cost-of-service customers.

Behind-the-meter (BTM) load growth. Staff states that BTM load growth can be accommodated provided all risks and cost shifts are addressed through transition charges or resource adequacy. Staff also asserts that a phased approach could address the rate of BTM growth by allowing only a certain percentage of BTM load growth each year. PacifiCorp believes that BTM load growth is tethered to the size of caps and agrees in theory that BTM load growth may not be a significant issue so long as all concerns about cost shifting and other risks are mitigated through program design.

E. Conclusion

PacifiCorp recommends that Staff revise its proposed schedule to allow for further discussion of its straw proposal and POLR rules before taking additional draft rules to public meeting.

Sincerely,

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PacifiCorp's Redline for Staff's Draft OAR 860-038-0170

PacifiCorp includes below a redline to Staff's most recent straw proposal (PacifiCorp additions underlined in **blue**; deletions in ~~**red strikethrough**~~).

860-038-0170
Non-bypassable Charges

(1) "Non-bypassable Charges" are costs that are directed by the legislature to be recovered by all customers or charges that retail consumers served by electricity service suppliers otherwise may avoid by obtaining electric power through direct access that are determined by the Commission to be appropriate for recovery from all customers. In determining whether a cost is appropriate for recovery as a non-bypassable charge, the Commission shall consider the following factors:

   (a) whether it is required by statute**;**
   (b) whether it is an uneconomic cost of implementing a public policy goal such as those identified in ORS 469A.465 or similar public policy goals related to reliability, equity, decarbonization, resiliency or other public interest for which retail consumers served by electricity service suppliers otherwise would not ~~**meaningfully**~~ contribute **their fair share**~~.~~**;**
   (c) whether or not it confers a demonstrable electric system benefit on some customers over others**;**
   (d) whether it is in the public interest**; and**
   (e) whether it is ~~**necessary**~~ **fair and appropriate for the charge** to be non-bypassable under the Commission's discretion ~~**in order to establish fair, just, and reasonable rates**~~.

(2) All retail electricity consumers served by Direct Access are responsible for paying Non-bypassable Charges as determined by the Commission.